

There was no appearance for the parties.

Per Curiam.—The Court thinks the agreement is void under the second clause of section 257 A of the Code of Civil Procedure (XIV of 1882). See the case of *Madhavráo Anant v. Chilu bin Tukárám*⁽¹⁾.

(1) Printed Judgments for 1881, p. 315.

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GANESH
SHIVRÁM
v.
ABDULLÁBEE.

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball.

NÁRÁYAN NAGARKAR (ORIGINAL PLAINTIFF), APPELLANT, v. VITHU JÁKHOJI AND TWO OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

June 24.

Civil Procedure Code Act XIV of 1882, Sec. 265—Suit in ejectment—Partition by Collector—Jurisdiction—Mortgage sale—Hindu law—Undivided property—Possession.

V. mortgaged to the plaintiff his house and certain undivided land in which H. and others, Hindu co-parceners, had a share. R. bought the interest of H. in the land at a Court sale, and let to H. and V., who, failing to pay rent, were sued by R., who got a decree for possession. This decree was transferred for execution to the Collector, who sold the land and rateably distributed the proceeds, except to V., who declined to take the amount tendered as his share.

The plaintiff sued V., and the purchasers under R.'s decree to recover his mortgage debt by a sale of the property mortgaged to him.

• Held that R.'s decree not being for partition of the family property, or for the separate possession of a share, was not one contemplated by section 265 of the Code of Civil Procedure. The proceedings of the Collector were without jurisdiction, and the plaintiff was entitled to ignore them, and assert his claim under the mortgage.

That the defendants being in actual possession—albeit through a sale under a void decree—could not be ousted in the present suit, and were entitled to say that the plaintiff had not proved his title to sell the specific lands mortgaged.

THIS was a second appeal against the decision of M. H. Scott, Judge of the District Court of Ahmednagar, confirming the decree of Ráv Sáheb Dinánáth A. Dalvi, Joint Subordinate Judge.

* Second Appeal, No. 72 of 1883.

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NARÁYAN
NAGARKAR
v.
VITHU
JAKHOJI.

The first defendant Vithu mortgaged his house and certain land to the plaintiff Náráyan on 11th February, 1876. The land was the undivided property of Vithu, Hassu, and several other sharers. One Sakhárám Malhar obtained a decree against Hassu, and in execution of this decree Rájárám became the purchaser of the right, title and interest of Hassu in the said land. Rájárám let the land to Hassu and Vithu. Hassu and Vithu having failed to pay the rent, Rájárám sued and obtained a decree in ejectment against Hassu and Vithu. On proceeding to take possession of Hassu's share it was found that the land belonging to the co-sharers had never been divided formally. The Collector was thereupon applied to by Rájárám under section 265 of the Civil Procedure Code (Act XIV of 1882) to make a partition; and as the Collector found that, according to the rules in force for the division of the land of which Rájárám claimed Hassu's share, the land could not be divided and Hassu's share apportioned, the Collector sold the whole land and divided the proceeds rateably among the co-sharers. The defendant Vithu, however, declined to receive the amount tendered to him. The sale was confirmed on 7th September, 1880.

The plaintiff, therefore, brought the present suit against Vithu, defendant No. 1, to recover the balance of the mortgage money by sale of the mortgaged property. The defendants Nos. 2 and 3 were joined as purchasers of the property at the sale by the Collector.

The Subordinate Judge held that the plaintiff was only entitled to Vithu's share of the money in the hands of the Collector, but not to the land in the hands of defendants 2 and 3. The District Judge confirmed the decree of the Subordinate Judge. The plaintiff appealed to the High Court.

Ghanashám Nilkanth Nádkarni for the appellant.—The Collector acted without jurisdiction in selling the land, as the decree under which he pretended to sell it was neither for partition nor for the separation of a share as contemplated in section 265 of the Code of Civil Procedure. There is, therefore, nothing to prevent the plaintiff from obtaining satisfaction of his debt by a sale of the mortgaged property.

Yashwant Vásudev Athlye.—Granting that the Collector's proceedings were *ultra vires*, and the sale by him illegal in consequence, the purchasers, as defendants in possession, are entitled to be protected in that possession until plaintiff establishes his claim to sell the specific lands belonging to an undivided Hindu family in payment of a debt due by one member. In a state of union it could not be predicated of any particular portion of family property that it belongs to a particular co-sharer. It is not competent to the plaintiff to proceed against any part of the family property except by a partition suit; but on partition it would be the duty of the Court making the partition to endeavour to give effect to the mortgage or sale—*Udirám Sitárám v. Pandu Ráñoji*⁽¹⁾. The purchasers, therefore, in the present case are entitled to retain their possession.

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 NARÁYAN
 NAGARKAR
 v.
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The judgment of the Court was delivered by

SARGENT, C. J.—The proceedings before the Collector were, in our opinion, altogether irregular. There was no decree such as is contemplated by section 265 of the Civil Procedure Code which could give jurisdiction to the Collector to proceed to a partition. Rájárám's suit against Vithu and Hassu was simply to recover possession of a certain defined piece of land which had been sold in execution of a decree obtained against Hassu and purchased by Rájárám, and subsequently let by him to Vithu and Hassu as his tenants. The plaint assumed throughout that the land belonged to Hassu as his share, and the Court directed that Rájárám should be put into possession of it as against his two tenants who had committed default in payment of their rents. There was no decree for the partition of the family property or for the separate possession of a share against co-sharers as contemplated by section 265 of the Civil Procedure Code.

The proceedings, therefore, before the Collector were altogether without jurisdiction, and plaintiff was entitled to ignore them and assert his claim under his mortgage. As Hassu is not a party to this suit, the question cannot be determined whether he would be estoppéd by the proceedings before the Collector from denying the title of the purchasers at the Collector's sale, but the purchasers

(1) 11 Bom. H. C. Rep., 76.

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are, at any rate, in possession, and are entitled in this suit to say that plaintiff has not established his title to sell the specific lands mortgaged to him. As Vithu refuses the share of the purchase-money allowed to him, and it is plain that a question may arise as to whom it belongs under the circumstances, the decree is wrong in authorizing plaintiff to pay himself out of it. The decree should, therefore, be varied by omitting all mention of the purchase-money. Plaintiff to pay the defendants their costs of this appeal.

Decree varied.

APPELLATE CIVIL.

*Before Sir Charles Sargent, Knight, Chief Justice, and
Mr. Justice Nanábhái Haridás.*

June 26.

DAGDUSA TILAKCHAND, PLAINTIFF, v. SHAMAD, DEFENDANT.*

Limitation Act, XV of 1877, Sch. II, Art. 64—Account stated—Simultaneous verbal agreement—Simultaneous written agreement.

A simultaneous verbal agreement cannot extend the ordinary period of limitation for a suit on an account stated. An agreement to extend the period must be in writing, and signed by the defendant or his agent.

UNDER section 617 of the Civil Procedure Code, Act XIV of 1882, this case was submitted for the opinion of the High Court by Ráv Sáheb Káshináth B. Maráthe, Subordinate Judge of Amalner.

The defendant Shamad undertook to pay to the plaintiff Rs. 24 on behalf of one Bába, and signed an account by his mark on 2nd January 1881. The plaintiff brought a suit against the defendant to recover the said sum in the Subordinate Judge's Court. The suit was based on the said account, and the plaint was presented on 14th January 1884,—that is, twelve days after the lapse of three years from the date on which the account was signed. The plaintiff alleged that when the account was signed, the defendant made a simultaneous verbal agreement

*Civil Reference, No. 15 of 1884.